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No. 82-23

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

FRANK MARSH, et al.,

Petitioners,

—v.—

ERNEST CHAMBERS,

Respondent.

ON WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

May the Nebraska Unicameral retain the same Presbyterian minister as its chaplain for sixteen years to open each legislative session with a denominational prayer, make him an officer of the Unicameral, compensate him for his prayers by a monthly salary, and reprint at state expense his official prayers in a Prayer Book for public distribution, without thereby violating the Establishment Clause of the First Amendment?

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STATEMENT OF THE CASE

By legislative rule 7(a)(1)(b), the Nebraska Unicameral Legislature has provided that each legislative day must begin with a prayer offered by the Legislature's official chaplain. Every morning the Unicameral is summoned to order and, once in order, the chaplain delivers his invocation. Pet. Br. 8. As the chaplain ascends the Speaker's podium, the legislative hall falls silent, the Senators rise to their feet, bow their heads, and receive the day's prayer. (JA 23).

The sole function of the chaplain hired by the Legislature is to offer prayer. (JA 41). The chaplain is paid from tax revenues $319.75 a month for his prayers. (Pet. App. 8). In 1975, 1978 and 1979, the chaplain's

prayers were reprinted for public distribution, also at State expense.

Since 1965, the Unicameral's chaplain has been Reverend Robert E. Palmer, a Presbyterian Minister. (JA 11). In 1979, a Lutheran clergyman was also nominated as chaplain. After debate among Senators (Tr. 8-9), Reverend Palmer was re-elected.

Every chaplain of the Unicameral has been a Christian. (JA 69). Petitioner Frank Lewis, Chairman of the Unicameral's Executive Board, conceded that most legislators would object if a non-Christian were appointed chaplain (JA 69-71), and accordingly, in all likelihood, the Unicameral will never select a non-Christian for this post. (JA 26, 69-71). Mr. Lewis testified that the Unicameral would not

allow a Buddhist monk or a Sioux medicine man to give the daily prayer over a 15-year period, the length of Reverend Palmer's tenure. (Id.).

All witnesses at trial agreed that the prolonged retention of one chaplain fosters the impression that his religion is the "official" or "normal" religion of the State. (JA 29-30, 36, 62). As Reverend Palmer testified (JA 62):

> Q. Would you agree that by having a uniquely Christian Chaplain in the Legislature it adds a certain air of officialdom to the Christian faith?
>
> A. It could be perceived as such.

All of Reverend Palmer's prayers invoke Diety; all of them are theistic. (JA 58-59, 82). Half of them are uniquely Christian, supplicating Jesus Christ. (JA 23, 95-108). The chaplain's prayers

have offended several Jewish Senators as well as Senator Chambers. (JA 69). Senators have told Reverend Palmer that the chaplain's prayers have "offended them." (JA 61).

According to Reverend Palmer, his official task, offering prayer, requires him to invoke the Diety. Prayer is inconceivable without making reference to God, he explained. (JA 81). Despite the fact that all of his prayers invoke the Diety and half of them are overtly Christian, Reverend Palmer believes that his prayers reflect a non-sectarian "civil" religion (JA 83):

> A. The majority of the prayers reflect more of what I don't like to use as a phrase, but I will, to clarify things, just civil religion in America. The kind of religious expressions that are common to the vast, overwhelming majority of most all Americans.

Q. What do you mean by civil religion?

A. By civil religion I mean a religion that reflects the thinking of most Americans. And is not sectarian in any sense at all.

Until 1973, Nebraska's chaplaincy was ordained by statute. In that year the statute was repealed and the Legislature replaced it with two Rules (Pet. App. 8):

Rule 1, Section 2.

> In addition the Legislature shall advise and consent to the recommendations of the Executive Board of the Legislative Council the following officers ... Chaplain.

Rule 1, Section 21.

> The chaplain shall attend and shall open with prayer each day's sitting of the Legislature.

Respondent Ernest Chambers is a member of the Legislature and a citizen and taxpayer of Nebraska. He is the son of a Fundamentalist minister. By the time he completed high school he had read the

Bible eight times from cover to cover, having been taught to believe in it "word for word as it's spoken." (JA 27-28). Eventually, his religious views changed, and he no longer considers himself to be a Christian. (JA 25, 27-29).

Senator Chambers objects to the Chaplain's prayers and is made uncomfortable by them. He finds the entire chaplaincy program offensive on constitutional and religious grounds. As he explained (JA 23-24, 33-34):

> I see a situation where tax money paid in by my constituents is going to pay the salary of a man who represents a specific religion. In the same way that everybody should be free to practice whatever religion they want to, I should be free in my official capacity from religion .... Again, I know this, that the constitution guarantees me certain rights as a citizen. That one of these rights is that I can be free from the state imposing a religious ceremony on me. I know that I have a right to represent my constituents who voted for me. And

> when I'm prevented from having access to the chamber at all times because of a religious ceremony it inhibits me in a lot of respects. And we can say it's because of my personal views with reference to religion or whatever it is. The totality of my being is offended by what happens in the Legislature when those prayers are said there.

To avoid participating in prayer, Senator Chambers must absent himself from the chamber when the doors close shortly before the prayer begins, as legislators congregate. Because the period immediately preceding the prayer is a time when much informal legislative work is done in the chamber, Senator Chambers' aversion to official prayer has alienated him from his colleagues and has inhibited his legislative abilities. (JA 22, 24-25).

Senator Chambers filed this action for injunctive relief pursuant to 42 U.S.C. §1983. The district court rejected a

variety of jurisdictional and federalism challenges made by defendants and proceeded to the merits. It enjoined the State from using tax funds to pay the chaplain's salary and to reprint the chaplain's prayers, finding that these uses of public funds violated the Establishment Clause, although it ruled that the Constitution did not prohibit the Legislature from opening its session with prayer.

On cross appeals, the Eighth Circuit rejected defendants' jurisdictional and federalism challenges. On the merits, it found it unnecessary to decide whether the legislature could open its sessions with prayer. Viewing the Unicameral's practices as a whole -- the prolonged retention of a single chaplain, the use of tax funds to pay his salary, and the reprinting of his prayers -- the Court held that the combination of these factors

particularly the first, had the impermissible effect of advancing a particular religion (Pet. App. 36):

> [T]he purpose of the practice as a whole must be to advance and give preference to one religious view over others. There is little other reason for singling out one minister of one denomination for such an extended period of time ....

This Court granted certiorari limited to the question of whether Nebraska's compensation and retention of a legislative chaplain of one faith over an extended period of time is a forbidden law "respecting an establishment of religion."

SUMMARY OF ARGUMENT

Despite the urgings of petitioners and the Solicitor General, this case involves the constitutionality of Nebraska's retention of a single official chaplain for sixteen years, paid by public funds to open its legislative sessions by recitation of a denominational prayer, not the constitutionality of legislative prayer standing alone.

Nebraska's chaplaincy violates the secular purpose test. Although petitioners assert that Reverend Palmer's prayers further the secular purpose of bringing the Legislature to order, this Court has held that states may not rely on overtly religious means to advance incidental or ultimate secular purposes, especially where such purposes could be advanced with secular means. School District of Abington Township v. Schempp, 374 U.S. 203 (1963); Stone v. Graham, 449 U.S.

39 (1980); Larkin v. Grendel's Den, 51 U.S.L.W. 4025 (1982). The Establishment Clause bars such reliance because it ordinarily denigrates and trivializes religion, as the state's conceded use of prayer as a behavioral control device -- as a gavel -- demonstrates here.

Nebraska's official sponsorship and subsidization of prayer also has an impermissible primary effect of advancing religion. Apart from violating the irreducible core of the Establishment Clause -- that no tax in any amount may be used to fund overtly religious activity -- Nebraska's practice has a forbidden symbolic effect of advancing religion generally, Larkin v. Grendel's Den, supra, and preferring a single denomination or group of denominations in particular, Larson v. Valente, 102 S.Ct. 1673 (1982).

Nebraska's chaplaincy also impermissibly entangles church and state, having

led to inter-religious disputes in the Unicameral and alteration of Reverend Palmer's prayers based on objections from various legislators.

The suggestion that Nebraska's chaplaincy is valid for reasons of history and tradition, despite its invalidity under the tripartite test, must be rejected. Unlike the practice reviewed in Walz v. Tax Commission, 397 U.S. 664 (1970), Nebraska's chaplaincy is not supported by current practice. Seventy-one of the 99 state legislative bodies have rejected Nebraska's model and rely on a voluntary, non-official, non-discriminatory chaplaincy. Twenty-nine state legislative bodies successfully maintain invocations by religious figures without any compensation. Nor does the judgment of history strongly support petitioners: John Jay and John Rutledge opposed prayer in the First Continental Congress,

the Constitutional Convention refused to accede to a call for daily prayer, and the chaplaincy created by the first Congress had features carefully designed to reduce the appearance of a symbolic establishment which Nebraska's practice lacks. In his final, considered judgment, Madison strongly opposed even that chaplaincy as inconsistent with the Establishment Clause. Objection to the congressional chaplaincy has been persistent and longstanding, and only a single court has ever upheld a paid official chaplain functioning as an integral arm of a legislature.

INTRODUCTORY STATEMENT

This appeal raises a narrow and precisely focused issue: May the Nebraska legislature require that each legislative session be commenced by the recitation of a denominational prayer by a single officially designated chaplain who receives a state salary and who has served as the official chaplain for sixteen years? The panel of the Eighth Circuit below, recognizing the precisely framed nature of the issue, declined to speculate on the constitutionality of legislative prayer in other factual settings, ruling only that the combination of factors presented in the Nebraska practice constituted an impermissible establishment of religion.[1]

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1. In our view, the practice challenged here also inescapably involves the state's publication of the chaplain's prayers at
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Similarly, this Court, in its limited grant of certiorari to the Eighth Circuit, recognized the narrow scope of this case or controversy by agreeing to review only:

> Whether the Nebraska legislature's compensation and retention of a single individual as chaplain for an extended period of time renders its legislative prayer practice violative of the Establishment Clause of the First Amendment of the United States Constitution.

Nebraska, and the Solicitor General as amicus curiae, now seek to argue a wholly

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public expense. Petitioners continue to defend that publication before this Court (see, e.g., Pet. Br. 41-42), despite their professed intention not to have appealed the district court's judgment striking down that portion of the Nebraska legislative chaplaincy practice. The printing of Reverend Palmer's prayers at State expense is an integral part of the practice on which the Eighth Circuit entered a judgment this Court is now called on to review. See Pet. App. 33-34.

different case, a case which they boldly -- and improperly -- claim respondent has conceded.[2] Instead of discussing the legality of the Nebraska practice actually before the Court, petitioners seek to deflect attention to the abstract issue of whether any legislative prayer at all is permissible under any circumstances. In effect, petitioners seek to defend not the Nebraska practice, but the practice adopted by two-thirds of the states which permit volunteer, non-official clergy access to the legislative chamber to deliver prayers prior to the opening of

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2. Contrary to petitioners' suggestion (Pet. Br. at 20-21), respondent does not concede the validity of legislative prayer without more. Rather, as is set forth more fully below, he believes that that issue is not before this Court.

a legislative session on a non-discriminatory basis.[3]

The systematic use of volunteer, unpaid clergy to open a legislative session raises troubling constitutional issues and, if valid, certainly goes to the

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3. Nebraska's practice of utilizing a single paid "official" Chaplain is shared by legislatures in only 16 other states and the United States Congress. Thirty-three states reject the concept of a state-compensated "official" legislative chaplain, relying instead on volunteer clergy. See Brief of the National Conference of State Legislatures Amici Curiae 3; see also infra at 58-59. For cases discussing issues raised by the use of voluntary, rotating clergy to open public meetings, see Bogen v. Doty, 598 F.2d 1110 (8th Cir. 1979); Marsa v. Wernik, 86 N.J. 232, 430 A.2d 888 (1981); Lincoln v. Page, 109 N.H. 30, 241 A.2d 799 (1968). The only authority upholding a state-funded official chaplaincy is Colo. v. Treasurer & Receiver General 392 NE 2d 1195 (1979). The authority of Colo is dimmed by the fact that this Court recently repudiated the narrow vision of the Establishment Clause adopted by the Massachusetts Supreme Judicial Court. Compare Larkin v. Grendel's Den, ___ U.S. ___, 51 U.S.L.W. 4025 (1982) with Arno v. Alcoholic Beverages Control Comm'n., 377 Mass. 83, 384 N.E.2d 1223 (1979).

very verge of the Establishment Clause.[4] Volunteer, unpaid prayer, however, is far less constitutionally objectionable than Nebraska's expenditure of substantial public funds to pay a single official state chaplain who serves for an extended period of time and whose denominational prayers are treated as an integral part of the Legislative session. In Widmar v. Vincent, 454 U.S. 263 (1981), the Court upheld the practice of permitting voluntary religious gatherings prior to class at no cost

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4. Although the constitutionality of legislative prayer per se is not at issue here, we note that this Court has consistently enforced a hermetic separation of church and state so far as prayer is concerned. See Treen v. Karen B., ___U.S.___, 102 S.Ct. 1267 (1982); Tilton v. Richardson 403 U.S. 672, 683 (1971). Engel v. Vitale, 370 U.S. 421 (1962) This Court has consistently held that prayer is inherently a religious practice and, for that reason, "each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves ... " Engel, supra, 370 U.S. at 435; see also id. at 429.

to the state in otherwise unused state university facilities. If, however, the practice in Widmar had involved a substantial expenditure of state funds to pay an official state university chaplain to preside over prayer services which officially began the university day, the result would almost certainly have been different. Stone v. Graham, 449 U.S. 39 (1981); Treen v. Karen B., __ U.S.___, 102 S.Ct. 1267 (1982); Tilton v. Richardson, 403 U.S. at 683; Engel v. Vitale, 370 U.S. 421 (1962).

The appellate jurisdiction of this Court does not extend to the hypothetical case petitioners now seek to argue. As we now show, whatever the validity of volunteer, unpaid and non-discriminatory legislative prayer in other settings, the Nebraska legislative practice, involving sustained favoritism to an official

chaplain of a single denomination at substantial state expense, does not pass constitutional muster.[5]

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5. The Solicitor General argues vigorously that the legislative chaplaincy of the United States Congress should be addressed in this case. We do not know whether the practice of the Senate and the House of Representatives is indistinguishable from Nebraska's; no factual record exists from which to make such a determination, since the Solicitor General has heretofore insisted that a challenge to the Congressional Chaplaincy program is barred under standing and political question doctrines, rendering the creation of such a record impossible. See genrally Elliott v. White, 23 F.2d 997 (D.C. Cir. 1928); Murray v. Buchanan, appeal pending No. 81-1301 (D.C. Cir. 1982). In any event, the Solicitor General's attempted defense of the Congressional chaplaincy practice by arguing that all legislative prayer is not absolutely prohibited by the Constitution is irrelevant, since that question does not resolve the case or controversy actually before this Court.

I. THE EXPENDITURE OF STATE FUNDS TO SUBSIDIZE A SINGLE OFFICIAL LEGISLATIVE CHAPLAIN WHO FORMALLY OPENS EACH LEGISLATIVE SESSION WITH A DENOMINATIONAL PRAYER CONSTITUTES AN ESTABLISHMENT OF RELIGION BECAUSE IT DOES NOT ADVANCE A PREDOMINANTLY SECULAR PURPOSE; HAS A PRINCIPAL OR PRIMARY EFFECT OF AIDING RELIGIOUS ACTIVITY; AND FOSTERS AN IMPERMISSIBLE ENTANGLEMENT BETWEEN CHURCH AND STATE.

In Larkin v. Grendel's Den, supra, this Court noted that Jefferson's metaphorical wall between church and state was "substantially breached" by creating the "mere appearance of a joint exercise of legislative authority by Church and State". 51 U.S.L.W. at 4027-28. Nebraska's expenditure of substantial state funds to employ a single, officially designated chaplain to open each legislative session with a denominational prayer violates the Establishment Clause because, like

the practice invalidated in Larkin, it "provides a significant symbolic benefit to religion," and indeed, to one religious denomination.

As this Court's opinion in Grendel's Den makes clear, the starting point for an analysis of Nebraska's program continues to be the three-part test enunciated by the Chief Justice in his opinion for the Court in Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) (citations omited):

> Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests have been gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute may not foster an excessive entanglement with religion.

Nebraska's version of the legislative chaplaincy violates each aspect of the Court's three-part test.

A. Nebraska's Employment of An Official Paid Chaplain For An Extended Period of Time To Deliver Denominational Prayers As An Integral Part of Each Legislative Session Does Not Advance A Predominantly Secular Purpose.

Petitioners argue that Nebraska's employment of Chaplain Palmer to open each legislative session for the past sixteen years with a denominational prayer satisfies the secular purpose prong of the Lemon test because it advances the secular purpose of calling the legislature to order "by means of a brief, solemn and thoughtful act in a traditional manner". (Pet. Br. 27)[6]

6. Chaplain Palmer's prayers are denominational in the broad sense that they accord with the religious beliefs of some religious people and not of others. Thus, at (Continued on following page)

In effect, Nebraska argues that its chaplaincy practice is valid because prayer serves as an alternative to gavelling the legislature to order. Such an argument both trivializes the secular purpose requirement and denigrates the role of prayer in our spiritual heritage.

1. Direct State Aid to an Overtly Religious Activity Cannot Be Justified as Advancing a Predominantly Secular Purpose.

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the time of judgment below, more than half his prayers were uniquely Christian (JA 55), and the others were all unquestionably theistic and Judeo-Christian, contrary to the beliefs of many of the major religions. Since the First Amendment forbids placing the state "on the side of one particular sort of believers," Torcaso v. Watkins, 367 U.S. 488, 495 (1961), Reverend Palmer's alleged recent decision to eliminate references to Jesus in his prayers (Pet. Br. 12), but not other references clearly Judeo-Christian in nature, is constitutionally irrelevant, even if true.

Every one of the Reverend Palmer's prayers is a religious activity. They all supplicate the Almighty. (JA 58-59, 82). Here, as in Engel 370 U.S. at 424-25,

> [T]here can, of course, be no doubt that the [chaplain's] prayer is a religious activity. It is a solemn avowal of divine faith and supplication for the blessings of the Almighty. The nature of such a prayer has always been religious ....

See also Abington School District v. Schempp, 374 U.S. 203, 224 (1963). The religious nature of the Chaplain's offerings is apparent on their face.[7]

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7. By contrast, such rote phrases as "God Save this Honorable Court" to open Court sessions, or "In God We Trust" imprinted on coinage, would not necessarily violate the secular purpose test. These standard phrases are so routinized as to have lost all theological significance, and moreover, are not uttered by clergymen, thereby averting the danger that prayers will be altered at a clergyman's discretion to create theological significance or a denominational preference.

The "secular purpose" test was initially developed by this Court to measure the validity of state action which had the incidental effect of benefiting religious institutions but which did not, necessarily, involve direct assistance to overt religious activity. In determining in these instances whether the challenged activity violated the purpose test, the decision has invariably turned on whether the activity in question was manifestly religious. Thus, for example, in McGowan v. Maryland, 366 U.S. 420 (1961), this Court ruled that Sunday closing laws advanced the secular purpose of assuring a uniform day of rest without providing direct assistance to an overtly religious activity and, thus, did not violate the Establishment Clause.

Similarly, in each of the cases considering varying forms of aid to parochial

education, this Court has ruled that the programs at issue were primarily designed to advance the secular purpose of assisting all children in the state to receive the highest quality education. E.g., Lemon v. Kurtzman, supra (salary supplements); Sloan v. Lemon, 413 U.S. 825 (1973) (tuition rebates); Committee for Public Education v. Nyquist, 413 U.S. 756 (1973) (maintenance grants, tuition tax credits). Since the secular government activity at issue in cases like McGowan and Lemon was seen as providing only an indirect benefit to religion, the secular purpose test acted as a helpful tool for sorting out permissible from impermissible activity.

When, however, the state has acted to provide direct assistance to an overtly religious activity -- such as worship--

the intent to assist religion has not been doubted. In School District of Abington Township v. Schempp, for example, "this Court held unconstitutional the daily reading of Bible verses and the Lord's Prayer in the public schools, despite the school district's assertion of such secular purposes as 'the promotion of moral values, ... the perpetuation of our institutions, and the teaching of literature'." Stone v. Graham, supra, 449 U.S. at 41. Similarly, in Epperson v. Arkansas, 393 U.S. 89 (1968), the Court invalidated a statute which forbade the teaching of evolution in Arkansas public schools because the statute was obviously a reaction to theological concerns and constituted direct aid to a single "religious sect or dogma". 393 U.S. at 106. See also Engel v. Vitale, supra; Treen v.

Karen B., supra; Stone v. Graham, supra; McCollum v. Board of Education 333 U.S. 203 (1948). The crucial factor present in Engel, Schempp, Epperson and Stone is also present here: the state's activity is inherently and unmistakably religious "and no legislative recitation of a supposed secular purpose can blind us to this fact." Stone, supra 449 U.S. at 41.

Nebraska contends that its prayer program passes the purpose test because it has a secular purpose: controlling the behavior of legislators. But this Court has never suggested that a professed ultimate secular purpose could be used to shield direct financial aid to overtly religious activity from constitutional invalidity. Accepting Nebraska's argument would trivialize the secular purpose test by justifying direct state aid to

overtly religious activity whenever that activity can be said to have even an incidental or ultimate secular effect. For example, Nebraska's version of the secular purpose test would justify direct state grants to churches to subsidize worship services because church attendance might reduce juvenile delinquency or drug abuse. Even though a legislator might reasonably believe that religion can prevent those social problems, however, a state may not intentionally rely on religious means -- may not directly aid overtly religious activity -- to advance a secular purpose. See Abington School District v. Schempp, 374 U.S. at 224.[8]

8. As the Court explained in Schempp, 374 U.S. at 224, "even if its purpose is not strictly religious, it is sought to be accomplished through readings, without comment, from the Bible. Surely the place of the Bible as an instrument of religion
(continued on following page)

Nebraska's attempted defense of its chaplaincy practice as a secular means of calling the legislature to order is precisely such an attempt to justify direct aid to an overtly religious activity -- worship. But although a state may validly pursue a secular purpose with secular means even if religion is thereby incidentally aided, it may not pursue a secular purpose such as bringing the legislature to order with religious means. This is

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cannot be gainsaid ...." Cf. Hall v. Bradshaw, 630 F.2d 1018, 1020-21 (4th Cir. 1980), cert. denied, 101 S.Ct. 1480 (1981) ("in this case the state has chosen a clearly religious means to promote its secular end. If a state could avoid the application of the First Amendment in this manner, 'any religious activity of whatever nature could be justified by public officials on the basis that it has beneficial secular purposes'").

especially true, where, as here, "these valid secular objectives can be readily accomplished by other [wholly secular] means." Larkin v. Grendel's Den, 51 U.S.L.W. at 4027; see also McGowan v. Maryland, 366 US 420, 449-452 (1961).[9]

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9. Petitioner Lewis testified at trial:

> Q. Let me put it this way. Isn't it true that the Legislature could be called to order and have a few minutes of silence without having a Chaplain do it?
>
> A. No question about it. Or an hour of silence. (Tr. 130).

Petitioners' rush to rely on unnecessary religious means strongly suggests that their "secular purpose" argument is cut from whole cloth, and has little to do with their actual purpose. Even if one were to accept Nebraska's asserted "secular purpose" at face value, it is unclear why state funds must be expended to hire a single official chaplain to deliver the opening prayer. Larkin v. Grendel's Den, supra 51 U.S.L.W. at 4027. Surely an appropriate degree of solemnity could be obtained by using guest speakers as is the practice in 71 of the nation's 99 state legislatures. Brief of National Conference of State Legislatures (NCSL) at 3.

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2. The Subordination of Prayer to Secular Purposes Denigrates Our Religious Heritage.

Confronted by a legal challenge to its chaplaincy practice, Nebraska -- and the Solicitor General as amicus curiae -- have resorted to an ill-considered attempt to defend legislative prayer, not as a religious experience, but as a secular aid in bringing the legislature to order. As respondent has demonstrated, state subsidized prayer may not be justified merely because it incidentally advances a legitimate secular purpose. But petitioner's argument has a further defect.

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Nebraska's lame suggestion that volunteer clergy would be unavailable is wholly unconvincing given the widespread use of volunteer, unpaid clergy in 29 of the nation's 99 state legislatures. Id at 4. There are more than 150 houses of religious worship in Lincoln alone from which volunteer clergy could be solicited. JA 52. Moreover, of course, the goal of legislative order could plainly be furthered without any prayer at all.

Nebraska may not use prayer as a behavior control device. Prayer is among the most intensely personal acts one can perform. To suggest that state subsidized prayer is a valid tool with which to gain a legislator's attention both denigrates our religious heritage and ignores the reason why government must "stay out of the business of writing or sanctioning prayers and leave that purely religious function to the people themselves ..." Engel, supra, 370 U.S. at 435 (emphasis added). To the devout, what petitioners do with prayer is a sacrilege.[10]

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10. As the Lincoln Journal stated editorially in response to the district court's decision, the state's transformation of prayer into the equivalent of a gavel

> really could be the supreme objection to the [Chaplain's] ceremony, constitutional tests aside. Prayer and spiritual exercise are such a deep, personal matter that their employment for secular reasons mocks and debases.

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Unlike the expedient arguments advanced in petitioners' brief, respondent Chambers does not denigrate Reverend Palmer's prayers as the functional equivalent of a gavel. Rather, he respects them for what they really are -- a sincere attempt by Reverend Palmer to seek Divine guidance for the Nebraska legislature.[11]

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Page 8, col. 1 (Dec. 25, 1980). See also Engel v. Vitale, 370 U.S. at 432 ("religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate.") (citation to Madison's Remonstrance omitted.)

11. Reverend Palmer candidly admitted the religious purpose of his prayers.

> My purpose there is, during a few moments, to enable the Senators and those around them to pause for a moment and reflect upon the divine significance of their daily doings .... I would say that I strive to relate the Senators and their helpers to the divine ... My purpose is to provide an opportunity for Senators to be drawn closer to their understanding of God as they understand God. In

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Whether or not such an appeal for Divine legislative guidance may take place in a voluntary, non-discriminatory manner at no cost to the state is a problem of no small difficulty. But where the state harnesses for its own purposes an appeal for Divine guidance at state expense under the leadership of a paid, official legislative chaplain, the state violates the Establishment Clause.

B. Nebraska's Employment of an Official, Paid Chaplain Over an Extended Period of Time to Deliver Denominational Prayers as an Integral Part of Each Legislative Session Has the Principal and Primary Effect of Advancing Religion.

Nebraska argues that paying an official chaplain to recite prayers at the opening of each legislative

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order that the divine wisdom might be theirs as they conduct their business for the day. (Palmer Dep. 20, 28, 46).

session does not "advance" religion, but merely acknowledges the role of religion as an "inspirational" force. (Pet. Br. 28-29). Where, however, as here, a state directly sponsors and subsidizes prayer in a highly visible setting fraught with symbolic significance, it is absurd to suggest that it does not advance religion.

1. State Sponsored and Subsidized Prayer Is By Definition an Advancement of Religion.

This Court has consistently recognized that the expenditure of state funds to support overtly religious activity constitutes an advancement of religion. As Justice Black wrote for the Court in Everson v. Board of Education, 330 U.S. 1 (1947):

> The "establishment of religion" clause of the First Amendment means at least this ... No tax in any amount, large or small, can be levied to support any religious activities or institutions.

330 U.S. at 116.

Following Justice Black's admonition, this Court has repeatedly invalidated attempts to expend public funds whenever a possibility existed that the funds might be used to subsidize worship or some other overtly religious activity. Thus, in Lemon v. Kurtzman, supra, this Court invalidated a 15 percent salary supplement to teachers of secular subjects in parochial schools because the funds might subsidize religious activity. If such a limited cash grant to a secular teacher in a parochial school has the effect of advancing religion, then surely cash payments to an official state chaplain to enable him to lead the State Legislature in prayer advances religion as well. In Tilton v. Richardson, this Court invalidated a portion of a federal statute providing for cash grants to sectarian colleges because the funds were to be used to build

facilities which might be used for worship twenty years in the future. 403 U.S. at 683. If such a potential subsidy of religious activity constituted an impermissible "advancement" of religion, surely the direct payment of a salary to an officially designated clergyman to permit him to lead the legislature in prayer constitutes an advancement of religion, as well.

In the years since Lemon and Tilton, this Court has repeatedly refused to permit the expenditure of state funds which might aid an overtly religious function.[12] The Court has consistently enforced the

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12. Levitt v. Committee for Public Education, 413 U.S. 472 (1973) (cash grants to parochial schools for grading examinations); Committee for Public Education v. Nyquist, 413 U.S. 756 (1973) (cash grants to parochial schools for building maintenance; tuition tax credits); Sloan v. Lemon, 413 U.S. 825 (1973) (tuition rebates); Meek v. Pittenger, 421 U.S. 349 (1975) (loan of instructional materials); Wolman v. Walter, 433 U.S. 229 (1977) (reimbursement of field trip expenses, loan of instructional materials.)

rule that state aid to religious institutions is permissible only when it is certain that it "will be used exclusively for secular, neutral, and non-ideological purposes," Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756, 780 (1973), cited with approval in Larkin v. Grendel's Den, supra, 51 U.S. L.W. at 4028, and where the recipient could guarantee the payments were incapable of use in subsidizing an overtly religious activity. Thus, in Tilton v. Richardson, supra, Hunt v. McNair, 413 U.S. 734 (1973), and Roemer v. Board of Public Works, 426 U.S. 736 (1976) this Court upheld cash grants to sectarian universities only after determining that the funds could not be used to subsidize worship. Most recently, in Committee for Public Education v. Regan, 444 U.S. 646 (1980), this Court upheld

direct reimbursement of a parochial school for the cost of grading required standardized tests only after determining that the funds could in no way be used to subsidize overtly religious activity. See also Larkin v. Grendel's Den, supra. Nebraska concededly uses state funds to sponsor and subsidize prayer. Given this Court's painstating refusal to tolerate far less objectionable subsidies, one can hardly imagine a more impermissible advancement of religion than Nebraska's chaplaincy practice.[13]

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13. By contrast, in Walz v. Tax Commission, on which petitioners and the Solicitor General place their principal reliance, the Court emphasized that the "aid" which a tax exemption arguably provided a church was not the forbidden "sponsorship" of religion because it was afforded not only to churches but rather to "a broad class of property", including hospitals, libraries and patriotic groups. 397 U.S. at 673. The opinions in Walz leave little doubt that direct state subsidization of prayer, rather than of a broad class of non-profit activities of (continued on following page)

2. The Nebraska Practice Has the Symbolic Effect of Advancing Religion Generally.

Respondent has demonstrated that Nebraska's expenditure of funds to subsidize a "specifically religious activity in an otherwise substantially secular setting" falls squarely within this Court's definition of "advancement of religion". Hunt v. McNair, 413 U.S. at 743. However, as this Court recently

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which churches were only a smaller part, would have been struck down as violative of the neutrality principle of the Establishment Clause. See, e.g., id at 673 675-76; id at 696-97 (Harlan, J.). Thus, if Nebraska had a practice of inviting and paying speakers from a variety of fields to open legislative proceedings, certainly the First Amendment would permit the inclusion of religious figures along with secular figures. See generally Widmar v. Vincent, supra. Nor does this case raise the propriety of expending state funds to permit individuals confined to prison or in the military service to exercise their religion freely. No suggestion has been made -- nor could one be -- that legislators require a state funded chaplain in order to exercise their religion. See generally Schempp, 374 US at 296-298 (Brennan, J., concurring).

held, Larkin v. Grendel's Den, Inc., one need not actually expend state funds to improperly advance religion. It is enough to "provide a significant symbolic benefit to religion", 51 U.S.L.W. at 4028.

Petitioners' program provides such an impermissible symbolic benefit. Even beyond the mere prayer, which itself gives the impression that the State believes there is a God to whom prayers should be offered, the creation of the state funded chaplaincy "provides a significant symbolic benefit to religion in the minds of some by reason of the power conferred." Larkin, 51 U.S.L.W. at 4028. See also Stone v. Graham, supra, 449 U.S. at 42 (emphasis added) ("the mere posting of [the Ten Commandments] under the auspices of the legislature provides the 'official support of the State... Government' that the Establishment Clause prohibits. [Schempp, supra,

374 U.S.] at 222.")

Moreover, the chaplaincy program, with its prolonged retention of one chaplain, gives the impression that the chaplain's religion is the official religion of the State, or at least a favored one. This symbolism is inevitable because petitioners have placed "the power, prestige and financial support of government behind a particular religious belief." Engel, supra, 370 U.S. at 431. See also Stone v. Graham, supra.

In Larkin, Massachusetts authorized a church to veto the grant of a liquor license within 500 feet of a place of worship. This Court ruled that although the state might well enact a zoning ordinance regulating the sale of liquor in the vicinity of houses of worship, it could not delegate legislative power to a church without violating the Establishment Clause by giving the appearance of

symbolically reaffirming the importance of religion. 51 U.S.L.W. at 4078.

Nebraska has symbolically affirmed the importance of religion far more directly than by delegating a portion of its zoning authority to a church. Nebraska has vested an official chaplain with the power to lead the Legislature in public prayer at the beginning of each legislative session, and has emphasized the significance of the religious ceremony by both including it in the normal order of business of each legislative day and reprinting the prayers at state expense. If Nebraska required that every legislative session be commenced by a short inspirational talk by a football coach or a disabled person, instead of by a clergyman, the symbolic significance of its choice would be obvious; but in these cases, no provision of the Constitution

would condemn the symbolism. The decision to confine the opening speaker to a clergyman who leads the legislators in worship is no less a symbolic affirmation of religion. Both the chaplain and the religious symbols themselves (prayers) constitute a state-financed reinforcement and sponsorship of religion which provides "the appearance of a joint exercise of legislative authority by Church and State" condemned by this Court in Larkin, 51 U.S. L.W. at 4028.[13]

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13. Although petitioners attempt to draw comfort from the fact that "Respondent is free to absent himself during the offering of the morning prayers (Pet. Br. 30), "'the availability of excusal or exemption simply has no relevance to the establishment question, if it is once found that these practices are essentially religious exercises designed at least in part to achieve religious aims.'" Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. at 786, citing Schempp, supra, 374 U.S. at 288 (Brennan, J., concurring). See also Engel, supra, 370 U.S. at 430-31. The symbolic union of

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3. Nebraska's Practice has the Effect of Advancing a Single Denomination or Group of Denominations.

Nebraska's practice not only constitutes a symbolic advancement of religion generally, it also declares an official preference for a specific set of sectarian beliefs by conferring the state's imprimatur upon a single "official chaplain" for an extended period of time. The existence of an official chaplain whose prayers have opened each session of the legislature for the past 16 years inexorably places the imprimatur of the state upon the favored religious denomination.

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church and state violates the Establishment Clause regardless of the availability of individual exemption.

Petitioners conceded at trial that an "official" chaplain will almost inevitably reflect the dominant faith in the political community. (JA 26, 29-30, 36, 62, 69-71.) The public record confirms the wisdom of petitioners' concessions. In Nebraska, the dominant faith is Protestant, and no one except a Protestent has ever served as the Legislature's official chaplain. In Massachusetts, on the other hand, where the dominant faith is Catholic, the official chaplains of both houses of the Massachusetts Legislature are, and always have been, Catholic. Colo v. Treasurer and Receiver General, supra. In the United States Congress, both "official" chaplains have mirrored the majority Protestant faith of the nation.[14]

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14. Both congressional chaplains have always been Protestant except for a brief
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The pattern is clear. Where the majority chooses an official chaplain, it will, understandably, select a chaplain who mirrors its own religious beliefs.[15] Such a decision, however, can only reinforce the prestige and power of the majority's sectarian beliefs, in flat disregard of the Establishment Clause. In a very real sense, by employing Reverend Palmer for 16 years as its official legislative chaplain and by empowering him to open each legislative session with a public denominational prayer, Nebraska has dramatically advanced religion,

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period in 1832, when a Catholic served.

15. Cf. Lemon v. Kurtzman, 403 U.S. at 622 ("It would be unrealistic to ignore the fact that many people confronted with issues of this kind will find their votes aligned with their faith.") The survey of the National Conference of State Legislatures discloses that some legislatures, apparently by rule or tradition, specifically
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Christianity in general, and the Presbyterian Church in particular, in violation of "the clearest command of the Establishment Clause ... that one religious denomination cannot be officially preferred over another." Larson v. Valente, __ U.S.__, 102 S.Ct. 1673, 1683 (1982).[16]

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provide for chaplains of certain faiths. For example, the Colorado Senate has one rabbi and two Protestant ministers; the Missouri House of Representatives has a Protestant minister and a Catholic Priest. See Brief of NCSL 3.

16. Compare Walz v. Tax Commission, supra, where the Court emphasized that New York's broad exemption of non-profit institutions from property taxation did not "single out one particular church or religious group". 397 US at 672-73.

c. Nebraska's Employment of a Paid, Official Chaplain for an Extended Period of Time to Deliver Denominational Prayers as an Integral Part of Each Legislative Session Inevitably Fosters an Impermissible Entanglement Between Church and State.

The basic purpose of the Establishment Clause is two-fold: (1) the limitation of Church influence in secular affairs and (2) the protection of religious independence from state encroachment. See generally Everson v. Board of Education, supra; Engel v. Vitale, supra; and Walz v. Tax Commission, supra. We have already seen, supra at 33, the great temptation which exists to use religion as a handmaiden of government. Indeed, that is exactly what Nebraska claims to have done. Where, as here, religion becomes inextricably intertwined in the legislative process, the degree of entanglement

between church and state becomes wholly unacceptable.

Two examples disclosed by the record in this case illustrate the extent of the entanglement. In 1979, after Reverend Palmer, a Presbyterian, had served as Nebraska's legislative chaplain for 14 years, several members of the Legislature sought to replace him with another minister. The resulting contest was resolved by an election on the Senate floor which pitted a Lutheran clergyman against a Presbyterian clergyman for the position of "official" chaplain. [Tr. 8-9]. One can hardly imagine a clearer case of impermissible entanglement and a clearer invitation to religious divisiveness. In 1980, after a prayer delivered by a guest chaplain which had stressed the divinity of Jesus, several Jewish

members of the legislature felt compelled to express their discomfort to Reverend Palmer. (JA 49) Given the official nature of his position, Reverend Palmer felt constrained to alter his prayers to suit the religious sensibilities of members of the Legislature. While his response was personally generous, the controversy illustrates the degree to which Reverend Palmer's official duties forced him to alter his religious beliefs for political reasons. Where official obligation dictates the content of a clergyman's prayer, the entanglement between church and state has reached unacceptable proportions.[17]

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17. Reverend Palmer's alleged recent decision to make his prayers more Judeo-Christian highlights the entanglement problem. He has the absolute discretion to do so, and his successor will have the same discretion to reverse that decision. Although petitioners strangely attempt to rely repeatedly on the fact that "no input is provided with respect to the preparation of the prayers, that matter being (continued on following page)

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left entirely to the Chaplain," Pet. Br. 31, see also id 17, 31, this relinquishment of secular control to a religious authority demonstrates the Establishment Clause violation a fortiorari. In the words of Larkin, 51 U.S.L.W. at 4028, "the [Chaplain's] power under the statute is standardless .... That power may therefore be used ... for exclusively religious goals ... '[T]he potential for conflict inheres in the situation.'" (citation omitted).

Ironically, petitioners seek to justify their prolonged retention of one chaplain on entanglement grounds, arguing that the selection of a chaplain at more frequent intervals would "embroil" the Unicameral "with religion." (Pet. Br. 38-39). This argument proves the very point respondent is making, conceding that the choice of chaplains is inherently a religious decision.

II. HISTORY DOES NOT VALIDATE THE NEBRASKA CHAPLAINCY PRACTICE.

Apparently recognizing the futility of seeking to defend the expenditure of government funds to support a single official legislative chaplain for an extended period of time under the Lemon test, the Solicitor General seeks to establish a general historical exception to the Establishment Clause for the institution of legislative prayer. Disregarding the language of the Establishment Clause and the neutral principles of this Court's opinions, the Solicitor General argues that the existence of 200 years of legislative prayer, dating from the founding of the Republic, must be given controlling weight. But although the historical practice of other branches of government may be of assistance in resolving close cases, it can never relieve this Court of the duty to reach an independent and contemporaneous determina-

tion of constitutional law.[18] It is,

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18. "In the application of a constitution ... our contemplation cannot be only of what has been but of what might be." Weems v. United States, 217 U.S. 349, 373 (1910). See, e.g., Brown v. Board of Education, 347 U.S. 483 (1954)(finding views of Fourteenth Amendment framers concerning school segregation only of limited value); New York Times v. United States, 403 U.S. 713 (1971)(broad interpretation of First Amendment despite early congressional enactment of Alien and Sedition Acts). Religious practices which in the past found no opponents could be highly objectionable today. As Justice Brennan has noted:

> [The constitutional framers] knew differences chiefly among Protestant sects. Today the Nation is far more heterogeneous religiously, including as it does substantial minorities not only of Catholics and Jews but as well of those who worship no God at all .... In the face of such profound changes, practices which may have been objectionable to no one in the time of Jefferson and Madison may today be highly offensive to many persons, the deeply devout and the nonbelievers alike.

Schempp, supra, 374 U.S. at 240-41 (concurring opinion)(citations and footnotes omitted). Where in 1789 there were only a handful of religious sects in the coun-

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however, unnecessary to confront the relationship between historical practice and constitutional adjudication in this case, since the Solicitor General's appeal to settled historical practice fails even on its own terms.

First, no settled current practice exists of using a single, official, non-rotating chaplain to lead legislators in prayer at the commencement of each legislative session. As with petitioners' legal argument, the Solicitor General makes an argument, not for the case actually before this Court, but for the one he wishes were before it. The bulk of the Solicitor General's data establishes nothing more than a willingness to permit rotating, generally volunteer, non-official clergy

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try, almost all of them Protestant, "[t]oday, authorities list 83 separate religious bodies, each with a membership exceeding 50,000 existing among our people, as well as innumerable smaller groups." 374 U.S. at 214.

to engage in voluntary prayer prior to the commencement of a legislative session. Whatever the serious constitutional issues raised by such a non-discriminatory religious practice, they pale in comparison with Nebraska's practice of utilizing a paid, official and permanent legislative chaplain.

The careful survey of the NCSL makes clear that the Solicitor General's claims concerning current practice are myopically Washington-centered and seriously misapprehend the national consensus. Seventy-one of the 99 state legislative bodies have rejected the Nebraska model in favor of a voluntary, non-official, non-discriminatory chaplaincy. Brief for NCSL 23. Even the 28 legislative bodies which retain chaplains do not ordinarily permit them to serve for lengthy periods: "most have briefer tenures in keeping with their ceremonial status."

Id. at 4. Twenty-nine legislative bodies maintain invocations by clergy without providing any expenditure of public funds. Id. Adoption by fewer than one-third of our state legislative bodies hardly qualifies as an overwhelming mandate. If anything, contemporaneous practice dramatically rejects the Nebraska model.[19]

Second, the Solicitor General's history is no more persuasive than his canvass of current practice. It is true that the first session of the Continental Congress resolved to open its third day with a prayer by Reverend Jacob Duché, an Episcopalian clergyman, and that the practice ripened into the formal appointment of Reverend Duché as chaplain to Congress in 1776. 1 Journals of the Continental Congress (Journals) 26 (1774); 5 Journals

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19. For this reason, petitioners' reliance on Walz v. Tax Commission, supra, is singularly misplaced.

530 (1776); 6 Journals 886-887 (1776). It is equally true, however, that the practice of legislative prayer at the first Continental Congress was opposed by John Jay, who was to serve as the First Chief Justice of the United States Supreme Court, and by John Rutledge, who was to serve as Chairman of the Committee on Detail at the Constitutional Convention, as an Associate Justice of the United States Supreme Court from 1789 to 1791, and as Chief Justice of the Supreme Court of South Carolina from 1791-1795.[20] See Letter from John Adams to Abigail Adams (Sept. 16, 1774), reprinted in P. Smith,

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20. Rutledge was nominated to serve as Chief Justice of the United States Supreme Court in 1795, but the Senate declined to confirm him because of his outspoken opposition to the Jay Treaty. The Committee on Detail under Rutledge is credited with preparing the first draft of the Constitution.

1 Letters of Delegates to Congress, 1774-1789, at 74 (1976).

Thus, two of the leading legal minds of the infant Republic challenged the legislative chaplaincy at its inception. Moreover, at the Constitutional Convention itself, no move to inject prayer into its proceedings took place until more than one month after the Convention assembled. When Benjamin Franklin proposed a resolution that each day's session commence with a prayer, the delegates declined to act on it. J. Elliott, Debates on the Adoption of the Federal Constitution 235-255 (2d ed. 1836). Given the significant roles played by John Jay and John Rutledge as delegates to the Convention, its failure to provide for opening prayers was not sur-

prising.[21]

Although petitioners and the Solicitor General rely heavily on the adoption of a chaplaincy by the First Congress, the practice it adopted highlights the invalidity of Nebraska's chaplaincy.[22] The First congress was sensitive to the constitutional dangers of its chaplaincy, and relied on three factors in an attempt to eliminate a symbolic establishment.

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21. Only one of the ratifying conventions appears to have utilized a paid, official chaplain in the Nebraska mold. Debates and Other Proceedings of the Convention of Virginia 13 (June 2, 1788); 3 J. Elliott, supra at 1. The majority of the ratifying conventions appear to have dispensed totally with prayers.

22. Before ascribing constitutional omniscience to the First Congress, it is well to remember that the provisions of the Judiciary Act of 1789 which were invalidated in Marbury v. Madison, 1 Cr. 137 (U.S. 1803) were the work of the First Congress.

First, Congress required the House and the Senate to select chaplains of different denominations; second, Congress required rotation of these chaplains from chamber to chamber on a weekly basis;[23] and third, Congress did not make its chaplains officers of the House or Senate.[24] By contrast, Nebraska has no provision requiring even the yearly selection of different chaplains; has retained the same chaplain for 16 years; and makes the chaplain an Officer of the Legislature.

More fundamentally, James Madison, a member of the First Congress and a prin-

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23. Journal of the Senate, 1st Cong., 1st Sess. 12 (1789); 1 Journal of the House, 1st Cong., 1st Sess. 16 (1789). See also Act of Sept. 22, 1789, Ch. XVII, 1 Stat. 70-71.

24. "The Chaplain was not originally an officer of the House or of the Senate, but became one in 1856." A. Hinds, Precedents of the House of Representatives of the United States, § 275 (1907). See also id. §§ 190, 273-74, 276-82.

cipal architect of the Bill of Rights, realized that the First Congress' appointment of even a rotating non-official chaplain was inconsistent with the principles of religious freedom for which he had so vigorously campaigned. In a voice that speaks authoritatively of the true meaning of the Establishment Clause, Madison reminds us:

> Is the appointment of Chaplains to the two Houses of Congress consistent with the Constitution, and with the pure principles of religious freedom? In strictness, the answer on both points must be in the negative. The Constitution of the U.S. forbids everything like an establishment of a national religion. The law appointing chaplains establishes a religious worship for the national representatives, to be performed by Ministers of religion, elected by a majority of them; and these are to be paid out of the national taxes. Does not this involve the principle of a national establishment, applicable to a provision for a religious worship for the Constituent as well as of the representative Body, approved by the majority, and

> conducted by Ministers of religion paid by the entire nation? ... [I]t be proper that public functionaries, as well as their Constuents should discharge their religious duties ... at their own expense.

J. Madison, Detached Memoranda, quoted in L. Pfeffer, Church, State and Freedom, 248-49 (Beacon Press rev. ed. 1967).[25]

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25. Thus although Madison did briefly retreat from his position in the Remonstrance, and vote to permit a legislative chaplain in the First Congress, he subsequently came to the conclusion that Congress' chaplaincy program was unconstitutional. Indeed, it appears that he had objected from the outset to using public funds for the chaplain's salary. In a letter written to Edward Livingston in 1822, Madison said:

> I observe with particular pleasure the view you have taken of the immunity of Religion from civil jurisdiction ... This has always been a favorite principle with me; and it was not with my approbation, that the deviation from it took place in Congs. when they appointed Chaplains to be paid from the Natl. Treasury.

9 Writings of James Madison 100 (G. Hunt, ed. 1910).

Third, the Solicitor General's appeal to tradition is no more compelling than his attempt to appeal to contemporary practice and historical evidence. Even if our tradition were factually similar to the Nebraska practice before the Court (it is not, since fully two-thirds of the states reject the Nebraska model), tradition cannot be relied upon here since the continued existence of the legislative chaplaincy is a tribute not to its enduring legal virtue or a consensus supporting its constitutional validity but to restrictive rules of standing which rendered it impregnable to judicial review until the modern era, and which the Solicitor General continues to interpose to block review of the congressional chaplaincy. During the 19th century, no judicial challenges to the legislative chaplaincy were reported because, under prevailing stand-

ing doctrine, none were possible. However, agitation over the practice was sustained and widespread, leading to the temporary abolition of official chaplains by both houses of Congress during the 1850s. See generally, Cong. Globe, 35 Cong., 1st Sess. 14, 28 (1857). For a description of the sustained attack on the concept of an official congressional chaplain, see, e.g., H.R. Rep. No. 171, 31st Cong., 1st Sess. (1850); S.Rep. No. 376, 32nd Cong., 2d Sess. (1853); H.R. Rep. No. 124, 33rd Cong., 1st Sess. (1854). In the twentieth century, attempts to challenge the concept of an official paid chaplain foundered, once again, on the standing doctrine. Elliott v. White, 23 F.2d 997 (D.C. Cir. 1928); Murray v. Buchanan, appeal pending, No. 81-1301 (D.C. Cir.). With the recognition in Flast v. Cohen, 392 U.S. 83 (1968) of taxpayer standing in certain Establish-

ment Clause cases, judicial review of the extent to which state funds may be expended on an official legislative chaplain has proceeded in a normal course.[26] While courts have been sympathetic to the concept of permitting voluntary and non-discriminatory prayer prior to a public function, Widmar v. Vincent, supra, Colo is the only case to uphold the use of a paid, official chaplain who functions as an integral arm of the Legislature.

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26. E.g., Bogen v. Doty, 598 F.2d 1110 (8th Cir. 1979)(voluntary prayer by unpaid, rotating clergy at public meetings goes to verge of Establishment Clause); Marsa v. Wernik, 86 N.J. 232, 430 A.2d 888 (1981)(same); Wiest v. Mt. Lebanon School District, 457 Pa. 166, 320 A.2d 362 (1974)(same); Lincoln v. Page, 109 N.H. 30, 241 A.2d 799 (1968)(same). See also Colo v. Treasurer & Receiver General, 392 N.E.2d 1195 (1979)(upholding paid, official chaplaincy under Equal Protection Clause) and Murray v. Buchanan, supra (challenging congressional chaplaincy).

In sum, the historical evidence, far from supporting the Nebraska chaplaincy, condemns it on the authority of James Madison, John Jay, John Rutledge and the members of the Constitutional Convention. It also condemns it on the authority of the First Congress itself. The same people who established a rotating chaplaincy in 1789 would disapprove of Nebraska's program today for the same reasons which motivated their initial choice.

Thus, whether viewed from the perspective of currently prevailing practice, historical perspective, or tradition, no basis exists to suggest that Nebraska's chaplaincy practice is entitled to an exemption from the strictures of the Establishment Clause.

Although couched as an appeal to history and tradition, the Solicitor General's position is, at bottom, an appeal for deference to legislative

judgment as to the meaning of the Constitution. Since, he argues, Congress and seventeen state legislatures have long believed it constitutional to expend funds for an official chaplain to lead the Legislature in prayer, this Court should ignore the palpable violation of the Establishment Clause inherent in such a practice and defer to legislative will. Such a suggestion wholly misperceives the role of the judiciary in our system of government. While deference should, of course, be accorded to the considered judgments of coordinate branches (and state legislatures), it is the duty of this Court to say what the law is.

The judgment of the Congress is a majoritarian judgment. If the majority is asked whether government funds may be expended to advance its religious beliefs, the majority will often answer "yes". That is why Madison recognized that it

was necessary to place a prohibition on majority attempts to "establish" religion in the first place. The essence of our form of government is that the majority's answer to whether the Establishment Clause permits paid, official legislative chaplains cannot be final. The duty to construe the Establishment Clause is vested not in the majority, but in this Court, and the Solicitor General's invitation to abdicate that duty by deferring to the will of the majority is a prescription for constitutional disaster.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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